92-997

SUPREME COURT, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CLAUDE TANNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal RICO Act language defining "racketeering" to include State law "bribery" offenses creates RICO liability based upon predicate offenses of paying unlawful compensation to a public official and comparable offenses involving graft or gratuities or other predicate offenses perceived as an attack upon the integrity of public officials, although none of these crimes require the traditional elements of a quid pro quo understanding.

2. Whether the RICO liberal construction clause is applicable to the interpretation of the scope of RICO penal prohibitions and, particularly, to the definition of predicate crimes; and whether that clause displaces the traditional rule of lenity.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Joseph Henry Kotvas, Jr., Cullen H. Williams, and Fred Arthur Anderson were parties in the court of appeals. (Mr. Anderson died before the appeal was decided.)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Claude Tanner, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (appendix, infra, A-1-20) is reported at 941 F.2d 1141.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1991. A-1-20. A petition for rehearing was denied on June 25, 1992. A-21-22. On November 2, 1992, Justice Kennedy extended the time to within which to file a petition for a writ of certiorari to and including November 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 1961(1), a definitional section of the RICO statute, provides in part as follows: "(1) 'racketeering activity' means (A) any act or threat involving ... bribery ..., which is chargeable under State law and punishable by imprisonment for more than one year; * * *."

The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947, provides that "The provisions of this title [RICO] shall be liberally construed to effectuate its remedial purposes."

STATEMENT OF THE CASE

1. On May 22, 1985, a grand jury sitting in Tampa, Florida, returned a 45-count indictment, charging petitioner and 29 co-defendants with various violations of the federal statutes relating to the corruption of public officials. Count One charged petitioner, his corporation and co-defendants with a conspiracy to conduct and participate in the affairs of an enterprise, the Board of County Commissioners of Hillsborough County, Florida, from on or about November 1976 until the date of the return of the indictment, through a pattern of racketeering activity consisting of various acts allegedly involving "bribery" chargeable under two Florida Statutes, Sections 838.015 and 838.016, in violation of 18 U.S.C. § 1962(d). R9-1289-10-26. Count Two charged petitioner, his corporation and co-defendants with the substantive offense of conducting and

participating in the conduct of the affairs of this enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). Id. at 27. In this count of the final redacted indictment, petitioner was charged with committing six acts of racketeering. Id. at 29-31, 45-46, and 64-65.

In addition to the two RICO counts, petitioner was charged with one count of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2, and one count of obstruction of justice, in violation of 18 U.S.C. § 1503.

On February 3, 1986, the trial started against petitioner, his company and 17 co-defendants. At the close of the government's case, petitioner moved, among other things, that the RICO charges be dismissed and/or that the portions of them relying upon the Florida Unlawful Compensation Statute be stricken. R134-109-141; 161-171.

Petitioner argued that the Florida Unlawful Compensation statute did not properly charge the RICO predicate crime of bribery. 2SR-4-1174. The trial court denied his motion. R134-115-117, 128-129, 131-135, 140-141, 165-166, 168; R135-26-27. At the close of all the evidence, petitioner's renewed motions were denied. R176-27-29, 31.

On July 9, 1986, after approximately five months of trial, the court instructed the jury. The court denied most of petitioner's requested instructions. R8-1230; R11-1237; R9-1249, 1264, 1266, 1269, 1283, 1285; 2SR-5-1237; R177-150-160; R176-56-60; R177-75-80, 86-91; R184-63-64; R185-98-99; R189-88-94. Significantly, the court refused to instruct the jury that RICO bribery requires an element of quid pro quo; that the bribe must be offered, promised or given before the occurrence of the official action which the bribe is intended to in-

fluence; and that contributions to political campaigns do not necessarily constitute bribery.

By July 19, 1986, after a complicated deliberative process, verdicts had been returned for all defendants on trial. They were published that day. The jury acquitted 15 defendnts on all counts. It convicted only four. R10-1311; R-38-45. As to petitioner, the jury returned verdicts of not guilty on Counts Two, Five, and Forty-Two, and a verdict of guilty on Count One (the RICO conspiracy). R10-1325. On September 25, 1986, the trial court sentenced petitioner to four years in prison and a fine of $25,000.00. R10-1450.

2. At trial, former County Commissioner Charles Bean testified for the government pursuant to a plea agreement. R83-146-152-53. Bean related that he was appointed to fill a vacancy on the Hills-

borough Board of County Commissioners, effective April 1, 1978. Id. at 143. He served in that capacity until 1980 when he was defeated for reelection by Joe Kotvas. Id. at 145.

Bean testified that he first met petitioner in May or June of 1980. Id. at 214. At that time, Bean contacted petitioner and set up a meeting to discuss his 1980 election campaign. Id. at 215. According to Bean, petitioner told him that he would be in position to make a lot of money because he would be the swing vote on the Board. Id. at 220. Bean testified that petitioner told him also that he and his associates were going to raise money for Bean's campaign and that petitioner wanted to be Bean's "man" in South Hillsborough County. Id. at 221.

Bean further testified that on July 28, 1980, petitioner gave him an envelope

containing approximately $4,700 in cash. Id. at 222-224. Bean said that petitioner told him that he had raised this money from friends in the south part of the county and that a large portion of it had come from Cullen "Buster" Williams (a co-defendant at trial). Id. at 223. Bean stated that he considered that this money was paid to him to influence him on the positions he would take as a commissioner. Id. at 225-226. Bean testified that he could not remember whether petitioner had any business before the Board in 1980. Id. at 225.

As a commissioner, Bean received money from many sources. He testified that in June 1987, he was paid $1,000 on behalf of William Peterson. R83-172-178. Moreover, Harvey Sharp, who was a competitor of petitioner's in the waste hauling business, paid Bean between $500 and $1,000 in $100 increments, generally about $100 a month.

R84-24-25. In this regard, Bean testified that Sharp had recurring business as a waste hauler before the Board. Id. at 25.

On cross-examination, Bean admitted that petitioner never offered, promised, or paid him a bribe for his vote on any petition pending before the Board. R89-167. Moreover, Bean never voted on any matter pending before the Board for which petitioner had given him any benefit in order to influence his vote. Id. Specifically, Bean indicated that petitioner did not pay him any money to influence his vote on the 1978 franchise renewal of petitioner's business. Id. at 173. Nor did he pay him any money to influence his vote on the 1980 garbage rate increase. Id. at 173-174. Moreover, petitioner did not attempt to influence Bean on these various matters. Id. at 175.

The government's first witness against petitioner was Jerry Bowmer, testifying pursuant to a plea agreement. Bowmer related that he was a county commissioner in Hillsborough County, Florida, from November 16, 1976 to February 1, 1983, having been elected to two four-year terms. R32-82-83. Bowmer said that he first ran for county commissioner in 1976 on a platform as a reformer who would provide honesty and integrity to county government. R38-10-11. He claimed that the total cost of his campaign was about $25,000 and that $20,000 came from his own money, putting him deeply in debt. Id. During the first week of November 1976, Bowmer met with petitioner and co-defendant John Demmi. Id. at 12. Bowmer claimed that when petitioner heard that Bowmer had contributed about $20,000 of his own money to his campaign, he offered to enter into a give-away bet with

Bowmer for the full $20,000. Id. at 13. Moreover, Bowmer testified that during this same meeting, petitioner told him that he would try to obtain $5,000 for him from the garbage haulers and that later on he would be able to obtain some more money for him. Id. at 14. Finally, according to Bowmer, as he left the meeting, petitioner told him that there would be $5,000 for him at a Christmas party. Id.

Bowmer testified that after this initial meeting, he had a series of contacts with petitioner between November 1976 and the middle of 1977. During these contacts, petitioner told Bowmer that he was a garbage hauler and explained to him that in Hillsborough County, the garbage haulers, developers, politicians, and other influential people, worked together for their own mutual benefit. Id. at 19. Bowmer said that petitioner told him that the commis-

sioners were in a good position to supplement their income by helping other members of the "family" in matters relating to zoning, licensing, and rate increases. Id. at 19-20. Bowmer testified that petitioner said he was a "bag man" for the County Commission, picking up money from other garbage haulers and developers and delivering it to the commissioners. Id. at 23-25.

In March 1979, Bowmer received $2,500 from petitioner to help pay the medical bills of a woman who had given birth and had named Bowmer as the father of the child. R38-78-79. Bowmer testified that there was a request for a garbage rate increase later in 1979 and that he had two or three meetings with petitioner to discuss the rate increase. R39-104-05. In this regard, Bowmer testified that he met with petitioner a couple of weeks prior to the Board of County Commissioners meeting on

August 22, 1979. Id. at 112. At this meeting, according to Bowmer, petitioner told him that he needed a dollar rate increase and that he would give him $1,000 or $2,000 for his vote on the petition. Id. at 112-113. On August 22, 1979, the Board of County Commissioners approved, by a vote of 4 to 1, a rate increase in the amount of 97 cents. Id. at 117-119. Bowmer testified that within a week after the vote, petitioner paid him $1,000 for his favorable vote on the rate increase. Id. at 121.

Bowmer testified that he developed a business and personal relationship with Cullen H. "Buster" Williams (a co-defendant of petitioner's) from the time they first met in the later part of 1979. R39-147-148. On December 5, 1979, the Board of County Commissioners met to consider a borrow pit application filed by Mr. Williams' Alafia Land Development Company for the

property known as the Fantasia Lake Borrow Pit. R39-143-144, 149. Bowmer testified that within one week prior to the Board meeting, he met with petitioner and Williams in the former's office. Id. at 145. At that time, petitioner introduced Bowmer to Williams and they discussed the upcoming vote on Williams' borrow pit application. Id. According to Bowmer, petitioner then told Williams to give Bowmer the money and he (Williams) gave Bowmer $1,000 or $2,000 for his vote on the borrow pit application. Id. at 145-146. The application was unanimously approved by the Board. Id. at 144.

On May 13, 1981, the Board approved, by a unanimous vote, a vacation of rights of way in an area known as Bahia Beach, where a private resort was to be developed. R42-17-19, 23. Bowmer testified that within 30 days after this approval by the Board, he had a conversation with petition-

er. Id. at 19. According to Bowmer, at that time petitioner told him that Wendell Smith, a personal friend and campaign supporter of Bowmer's, had $5,000 for him for his favorable vote on the Bahia Beach petition. Id. at 20. Thereafter, Bowmer met with Smith and told him about his conversation with petitioner. Id. at 21. Bowmer told Smith that he did not want any money since he had not done anything to earn it, and Smith told him that he did not intend to pay him anyway. Id. at 21. However, Wendell Smith testified that Bowmer did ask him for $5,000 but that he (Smith) turned him down. R93-126.

On August 17, 1981, an application was filed seeking a rezoning of property located in south Hillsborough County, from a commercial use to an industrial use ("Apollo Fab Building Rezoning"). R44-35-38. Bowmer testified that within one to two

months prior to the public hearing on the application scheduled for December 10, 1981, he had a series of meetings with petitioner. Id. at 37-38. During these meetings, petitioner indicated that he wanted the rezoning application approved because he had a secret interest in the property. Id. at 37. According to Bowmer, petitioner told him that he would pay him, and Commissioners Anderson and Kotvas, $1,000 each for their favorable votes on the application, and that he had given $1,000 to Buster Williams to give to Bowmer for that purpose. Id. at 39, 44-45. Bowmer further testified that there was a substantial amount of opposition to this application but that, after being pressured by petitioner, he accepted the $1,000 payment and voted in favor of the application, which was passed by the Board by a three to two vote. Id. at 47-50.

Harvey Sharp, who testified pursuant to an immunity agreement, admitted that he paid Bowmer $100 a month from the beginning of 1978 through about July 1979. R107-26-28; R108-151-152. Although Sharp testified that petitioner had suggested that Sharp's company raise money to be paid to the commissioners to influence their future actions, Sharp admitted that petitioner never said that the money would be used to pay bribes, rather than for legitimate lobbying purposes. Finally, Sharp stated that he had no personal knowledge of any bribe paid by petitioner.

3. On September 12, 1991, the court of appeals rendered an opinion. A-1-20. The court vacated the mail fraud convictions of other appellants. In all other respects, the court affirmed the convictions. The court of appeals held that the term "bribery" in the list of state law

offenses eligible to be used as federal RICO predicate crimes does not have a requirement that the person giving a benefit to a public servant act with a corrupt intent to influence the performance of the public servant nor a requirement of a quid pro quo understanding between the person and the public servant. A-14. Thus, the court affirmed a RICO conviction in which the prosecution had employed alleged violations of the Florida Unlawful Compensation statute as RICO predicate crimes of "bribery." In doing so, the court relied upon and followed a similar opinion in which the Seventh Circuit had allowed the prosecution in a federal RICO case to employ the Illinois Official Misconduct statute as "bribery" in violation of state law. United States v. Garner, 837 F.2d 1404, 1417-19

(7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988).[1] A15-17.

In Garner, the Seventh Circuit acknowledged that "[t]he test for determining whether the charged act fits into the generic category of the predicate offense is whether the indictment charges a type of activity generally known or characterized in the proscribed category, namely, any act or threat involving bribery." 837 F.2d at 1418, 1419 (quoting United States v. Forsythe, 560 F.2d 1127, 1137 (3d Cir. 1977)). But instead of then researching and analyzing what conduct was generally known and characterized as "bribery," the court of appeals looked to see what federal statutes Congress had included as RICO predicate

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[1]The denial of certiorari in Garner was not based on the issue of allowing the state law offense to serve as a RICO predicate crime. None of the petitioners presented this question in any of the petitions for a writ of certiorari. See Harold J. Knies v. United States, No. 87-1673, Hensley Garner v. United States, No. 87-6849, and Leo Gruenholz and Andrew Federinko v. United States, No. 87-7111.

crimes. Observing that Congress had incorporated both the federal bribery statute and the federal unlawful gratuity statute into the RICO lists of predicate crimes, the court read this as congressional intent to allow state unlawful gratuity statutes to be incorporated also. Focusing further on the issue of congressional intent, the court said "[w]e see no reason why Congress would have defined bribery more broadly for federal officials than for state officials ...." 837 F.2d at 1418. (The court apparently believed that its own inability to see why Congress had in fact differentiated between federal and state predicate crimes meant that Congress probably had not differentiated.) The court concluded that its logic was strengthened by the RICO liberal construction clause and relied upon that provision as supportive of expanding the scope of meaning to be given to the statu-

tory term "bribery." Id. at 1418-19. Thus, so goes the logic, when Congress said "bribery" it meant "gratuity" as well.

The Seventh Circuit further supported its conclusion by relying upon precedent of the Third Circuit. The Garner court decided "that bribery is defined generically as 'conduct which is intended, at least by the alleged briber, as an assault on the integrity of a public office or an official action,'" citing United States v. Forsythe, 560 F.2d 1127, 1137 n.23 (3d Cir. 1977) (quoting United States v. Dansker, 537 F.2d 40, 48 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977)). 837 F.2d at 1419. The Garner court then held "that an unlawful gratuity is an attack on the integrity of public officials and falls comfortably within the generic classification of bribery," id., expressly agreeing with United States v. Perkins, 596 F. Supp. 528, 531

(E.D. Pa. 1984), aff'd, 749 F. 28, 29 (3d Cir.), cert. denied, 471 U.S. 1015 (1985).

In the present case, the Eleventh Circuit embraced Garner. The court of appeals quoted Garner, A-18, added that "Congress intended for RICO to be read broadly," id. (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985)) and concluded that the "[a]ppellants' position would narrow the definition of predicate acts under RICO and frustrate the intent of Congress." Id.

Thus, the Eleventh Circuit also saw the question as one of congressional intent. The court of appeals employed the Garner methodology and divined what state law violations Congress had sought to escalate into RICO predicate crimes by looking at what federal law violations Congress had included and by construing the liberal construction clause as supporting a broad in-

terpretation of what state law violations could be elevated to RICO predicate crimes. The court of appeals made no effort to explain what conduct was generally known and characterized as "bribery" when RICO was enacted in 1970, except for its reliance on Garner, which equated "bribery" with an "attack upon the integrity of public officials."

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE THE GENERIC MEANING OF BRIBERY, AN IMPORTANT QUESTION OF FEDERAL LAW, AND TO RESOLVE CONFLICT AMONG THE CIRCUITS ABOUT THE PROPER DEFINITION AND SCOPE OF BRIBERY

The court of appeals erroneously enlarged the scope of the RICO statute by allowing plaintiffs, civil or criminal, to predicate RICO liability upon State statutes, such as the Florida Unlawful Compensation statute, which regulate the political arena but which do not require quid

pro quo corruption, a traditional element of the generic offense of bribery. The decision below raises a question of exceptional importance. And, it is part of a conflict among the circuits about the meaning of the term bribery.

A. The Basic Concepts

Petitioner submits that in framing the prosecution against him the government erroneously relied upon RICO predicate acts of racketeering activity involving the Florida "Unlawful compensation or reward for official behavior" statute rather than the generic crime of bribery.[2] In essence, RICO defines "racketeering activity" to include "any act or threat

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[2]As the court of appeals point out, "[t]his issue involves a question of law ...." A-14. So this Court should not be deterred from granting certiorari simply because there is a lengthy factual record in this case. The prosecution's error of law undermines the accusation itself as well as the proof and the jury instructions. Disposition of the two limited and interrelated Questions Presented herein should not make inordinate demands on this Court's time.

involving . . . bribery [or] extortion . . . which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(A).

What is meant by "bribery"? Congress has a general approach of using uniform, categorical definitions to identify and incorporate predicate offenses. E.g., Taylor v. United States, 495 U.S. 575, 590, 591, 601 (1990); United States v. Nardello, 393 U.S. 286, 293-95 (1969). Unless Congress has adopted the common law or provided a statutory definition, the definition of a term used by Congress is to be found by looking for the contemporary, generic, common understanding and ordinary meaning of the term at the time the legislature employed the term and enacted the law. Taylor, supra, 495 U.S. at 598; Perrin v. United States, 444 U.S. 37, 42, 45 (1979). A generically desig-

nated offense must contain all of the essential elements of the basic crime being identified by the term. Taylor, supra, 495 U.S. at 599, 602.

In passing RICO, Congress intended to incorporate state law offenses by such generic designation. S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969); H.R. Rep. 1549, 91st Cong., 2d Sess. 56 (1970), reprinted in 1970 U.S. Code & Ad. News 4007, 4032. Thus, Congress was referring to the common understanding and ordinary meaning of the legal term "bribery" at the time it enacted RICO in 1970.

B. **Bribery Defined**

Petitioner contends that the generic meaning of bribery was plain when Congress enacted RICO. Professor G. Robert Blakey, the acknowledged draftsman of RICO[3], has

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[3]This Court has recognized Professor Blakey as "the principal draftsman of RICO." Tafflin v. Levitt, 493 U.S. 455, 461 (1990) (citing and quoting Brandenburg v. Seidel, 859 F.2d 1179, 1193 (4th

identified certain fundamental distinctions between extortion, bribery and illegal gratuities:

> b. Graft distinguished from extortion and bribery
>
> It is accurate to conceptualize these three crimes on a continuum of criminal culpability where extortion, requiring the greatest culpability, merges into bribery, which then merges into graft, requiring little culpability. In the federal jurisdiction, and in those states that have separate statutes for extortion, bribery and gratuities, the fundamental state of mind distinction among the crimes is intent to influence for extortion and bribery, but knowledge for gratuities. Often, too, there is a distinction between bribery and gratuities in reference to the element of the [time] of the required conduct; a bribe must be offered before the occurrence of the official action [] that the bribe was intended to influence, while a gratuity may be paid before or after the official act being rewarded.

G. Robert Blakey & Ronald Goldstock, Official Corruption: Background Materials 68-69 (Cornell Institute on Organized Crime 1977) (emphasis in the original) (foot-

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Cir. 1988)).

notes omitted). Thus, bribery should not be confused with the giving of unlawful compensation to an official as gratuities, a form of graft which does not amount to bribery.

There are several important distinctions between bribery and unlawful compensation. The first is the requirement under bribery that an offer, promise or payment be made to a person in a position of trust conditioned upon the recipient's support on a matter within his or her discretion. Thus, the offer, promise or payment must be made with specific intent to influence a decision on a question before the recipient in a matter entrusted to his or her decision making. This element of quid pro quo is lacking in the concept of a mere unlawful compensation statute.

The common understanding and ordinary meaning of bribery we have outlined above

is clearly recognized in the federal case law. For example, Razete v. United States, 199 F.2d 44, 48-49 (6th Cir.), cert. denied, 344 U.S. 904 (1952), contains an excellent discussion of the difference between bribery and graft. See also United States v. Brewster, 506 F.2d 63, 68 (D.C. Cir. 1974)(discussing campaign contributions).

Likewise, the federal cases recognize the second distinction, the inherent temporal difference between bribery and unauthorized compensation. E.g., Woelsel v. United States, 237 F.2d 484, 488 (4th Cir. 1956). Federal statutes are structured much like the Florida statutes. The gratuity section, unlike the bribery section, applies to past official acts as well as future ones. Compare 18 U.S.C. § 201(b)

with § 838.015, Fla Stat., and 18 U.S.C. § 201(c) with § 838.016, Fla Stat.[4]

C. The Pleading, the Proof and the Jury Instructions

Each RICO count in the indictment relies upon both of the Florida Statutes. Further, Count Two (the substantive RICO count) contains two predicate acts of racketeering activity based upon the Unauthorized Compensation statute and naming petitioner. R9-1289-69; id. at 39-40.

The proof at trial on these predicate acts was after-the-fact conduct rather than a quid pro quo bargain. R42-17-19, 23; R96-162, 164-165, 171. Moreover, separate proof focused directly on campaign contributions paid by petitioner to County Commissioner Charles Bean, who was seeking funds for an election contest. R83-146-143-146, 214-226; R89-167-175.

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[4]For the convenience of the Court, the Florida statutory provisions are reproduced in the Appendix, at A-27-30.

The testimony made it clear that there was no quid pro quo arrangement tying the donation to any vote by the commissioner. R89-167-175.

Finally, the trial court failed to give requested jury instructions which would have told the jurors about the intent-to-influence element, the quid pro quo requirements, and the problems of dealings with campaign contributions. 2SR-3-902-24; 2SR-3-941-4; 2SR-3-959; R23-229-33; R24-22-35; R11-1237-28-30, 37-39; R177-156-58.

D. **The Argument Rejected**

The petitioner relied in the court of appeals upon the contemporary, generic meaning of bribery found in a variety of sources setting forth the law that Congress must have been familiar with and relied upon in 1970 when it enacted RICO. Petitioner cited the following: American

case law construing the term "bribery"; all the pertinent legal treaties; the foremost legal dictionary; several lay dictionaries; the two chief legal encyclopedias; a variety of law review articles; a Senate Report commenting on proposed bribery legislation; a prominent National Commission report; statements of the Solicitor General of the United States; and the common law of the United States. Petitioner also dutifully cited the only authority he found contrary to his position, a Seventh Circuit decision. United States v. Garner, 837 F.2d 1404 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988). The court of appeals adopted Garner as if petitioner's counsel had never written or spoken.[5]

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[5]Indeed, the court of appeals mistakenly mischaracterized petitioner's argument as a contention that Congress intended to incorporate some antiquated common law definition of bribery into the definition of racketeering activity. A-15. We assure this Court that we argued the correct

E. Conflict among the Circuits

Petitioner's view of the meaning of "bribery" appears to be debatable. Eight circuits define the crime of "bribery to require the traditional quid pro quo arrangement. **Second Circuit:** United States v. Biaggi, 909 F.2d 662, 679-85 (1990), cert. denied, --- U.S. ---, 111 S.Ct. 1102, 113 L.Ed. 2d 213 (1991); United States v. Malizia, 720 F.2d 744 (1983). **Third:** United States v. Niederberger, 580 F.2d 63, 68-69 (1978). **Fourth:** United States v. Muldon, 931 F.2d 282, 287 (19-91); United States v. Head, 641 F.2d 174, 180 (1981); United States v. Arthur, 544 F.2d 730, 734-735 (1976); Woelsel v. United States, 237 F.2d 484, 488 (1956); **Fifth:** United States v. Duvall, 846 F.2d 966, 972 n.6 (1988); United States v.

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test below (the generally recognized and commonly understood meaning of the term "bribery" in 1970) and that the record plainly bears us out on this.

Washington, 688 F.2d 953, 957 & n.4 (1982); Wagner v. United States, 263 F.2d 877, 881 (1959). **Sixth:** Razete v. United States, 199 F.2d 44, 48-50, cert. denied, 344 U.S. 904 (1952). **Ninth:** United States v. Hsieh Hui Mei Chen, 754 F.2d 917, 822, 825, cert. denied, 471 U.S. 1139 (1985); United States v. Strand, 574 F.2d 993, 995 & n.3 (1978). **Tenth:** United States v. Vap, 852 F.2d 1249, 1255 (1988). **District of Columbia:** United States v. Campbell, 684 F.2d 141, 148 (1982); United States v. Brewster, 506 F.2d 62, 72 (1974).

On the other hand, now three circuits hold that "bribery" is committed even when the traditional quid pro quo element is lacking. **Second Circuit:** United States v. Biaggi, 853 F.2d 89, 100-02 (1988); cf. United States v. Walsh, 700 F.2d 846, 851, 853-54 & n.4, 858 (1983) (court upholds

jury instruction allowing state statute to be used as Travel Act predicate crime of bribery when state statute provides that "[a] person commits a crime if he, directly or indirectly, confers or agrees to confer any benefit not allowed by law to a public servant to influence the performance of his official duties"; court declares that "[a]lthough ... [this statute] is technically a 'gratuity' or 'corrupt solicitation' statute, not a 'bribery' statute, [the statute] proscribes conduct which fits within the broad generic description of bribery."). **Seventh:** United States v. Garner, supra. **Eleventh:** United States v. Kotvas, supra.

What about these three circuits? The Second Circuit, affirming the Honorable Jack B. Weinstein, has pointed out that to some thinkers bribery no longer has a quid pro quo element:

> As the district court noted, the crime of bribery eludes precise definition. While the term "bribe" traditionally carried a connotation of corrupt intent to influence official action, the trend among scholars, commentators, and legislators has been away from linking impermissible bribery ineluctably to corruption, see Perrin v. United States, 444 U.S. 37, 100 S.Ct. 311, 62 L.Ed. 2d 199 (1979), particularly where the thing of value is given to a public official.

Biaggi, 853 F.2d at 101. Hence, this disagreement among the circuits we have just outlined gives the appearance of a major conflict, and such conflicts need to be addressed whether they are true conflicts or not.[6]

In fairness, we must point out that all of the cases we have found in which bribery is actually defined as not requiring the intent-to-influence and quid pro

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[6]Parenthetically, by listing the Second Circuit in both camps, we suggest some inconsistency there. But the panel opinion in the first Biaggi case (853 F.2d 89) seems to put the Second Circuit squarely in with the Seventh and Eleventh Circuits when bribery is being incorporated into a federal statute as a predicate crime.

quo elements are cases in which the court was undertaking to decide what qualifies as a Travel Act or RICO predicate crime and, therefore, was applying the generic definition of bribery.[7] Thus, it is possible that the seeming conflict actually arises from an unarticulated view that a generic definition of an offense need not contain all the essential elements of the basic crime. But see Taylor v. United States, 495 U.S. 575, 599, 602 (1990)(vacating conviction and remanding for further proceedings). Whatever the cause of the disagreement may be, however, it raises a question of exceptional importance.

F. A Very Important Question of Federal Law

The emerging redefinition of "bribery" releases the term from its tradition-

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[7]One other court takes this open-ended view of bribery, but in dictum. United States v. Perkins, 596 F. Supp. 528, 531 (E.D. Pa.), aff'd in unpublished order, 749 F.2d 28, 29 (3d Cir. 1984), cert. denied, 471 U.S. 1015 (1985).

al meaning and sets it loose in the political arena. The concept of "bribery" without a quid pro quo lacks genuine definition. The result is uncertainty and fluidity.

Moreover, the uncertainty of definition spawns serious void-for-vagueness problems. David B. Smith & Terrance G. Reed, Civil RICO ¶ 2.02[1] at 5-6 (1992). State statutes governing graft and gratuities, and even those touching upon campaign contributions, patronage decisions, lobbying efforts, legislative log-rolling, conflicts of interest and other aspects of the political process can now be proclaimed as prohibiting "bribery" and elevated into RICO or Travel Act predicate crimes. Indeed, activity such as making ex parte contact with an official could be regarded as "an assault on the integrity of a public office," Garner, 837 F.2d at

1419, and rewarded with a RICO case or Travel Act prosecution. We are talking about a serious "political thicket." See Colegrove v. Green, 328 U.S. 549, 556 (1946) (Frankfurter, J.)

The danger of abuse and interference with first amendment values should be obvious. As for political campaigns, this Court's recent decisions requiring a quid pro quo understanding as an element of Hobbs Act extortion "under color of official right," Evans v. United States, 504 U.S. ---, 112 S.Ct. 1881, 119 L.Ed. 2d 57 (1992); McCormick v. United States, 500 U.S. ---, 111 S.Ct. 1807, 114 L.Ed. 2d 307 (1991), do not protect the process when "bribery" can be defined not to require any quid pro quo arrangement and neatly substituted for the extortion theory of prosecution.

The danger of abuse is multiplied by the fact that private plaintiffs can bring civil RICO actions based upon the expansive approach authorized by this criminal RICO case. Indeed, several treatises on RICO law cite Garner. Douglas E. Abrams, The Law of Civil RICO § 5.3.1 at 268 (1991); 1 David R. McCormack, RICO: Racketeer Influenced Corrupt Organizations: Civil and Criminal § 5.01 at 4 (1992).

There are other abuses. An open-ended "bribery" concept leaves the scope of federal legislation to the whimsy of state legislatures and the vagaries of case-by-case interpretations of the court system. This approach abandons one major goal of adopting generic definitions: achieving uniformity of definition. E.g., Taylor v. United States, 495 U.S. 575, 590-92 (1990). This approach also puts the Judicial Branch in the business of writing legisla-

tion, an endeavor which is best left to the Legislative Branch.

Further, a broad, flexible scope of "bribery" empowers federal prosecutors and private plaintiffs to strike at the state and local government process and thereby to alter sensitive federal-state relationships. Thus, federalism is endangered. See generally Gregory v. Ashcroft, 501 U.S. ---, 111 S.Ct. 2395, 115 L.Ed. 2d 410 (1991); Coleman v. Thompson, 501 U.S. ---, 111 S.Ct. 2546, 115 L.Ed. 2d 640, 654, 668-70 (1991).[8]

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[8]Our concerns about federalism and potential political abuse are not fanciful. For example, in Dade County, Florida, the federal government has employed the Florida Unlawful Compensation Statute in the prosecution of officials such as the Mayor of Hialeah (the second largest city within the county), United States v. Raul Martinez, Case No. 90-231-CR-KEHOE(s)(s)(s), S.D. Fla., the former Mayor of Miami Beach, United States v. Alexander Daoud, Case No. 91-792-CR-KING, S.D. Fla., and various judges of the Circuit and County courts. United States v. Harvey Shenberg, et al., Case No. 91-708-CR-GONZALEZ, S.D. Fla.

Finally, complicated new cases can and will be brought in federal court by litigants espousing additional innovative "bribery" theories. Thus, the district courts will be further clogged with cases that should be heard elsewhere.

The opinions in Kotvas and Garner foster all of these problems, which are of exceptional importance to the body politic. And they raise other serious issues of methodology and statutory construction. For these reasons, the Court should vote to grant certiorari.

II. THE COURT SHOULD GRANT CERTIORARI TO END CONFLICT, CONFUSION AND UNCERTAINTY ABOUT THE APPLICABILITY OF THE RICO LIBERAL CONSTRUCTION CLAUSE TO INTERPRETATION OF THE SCOPE OF RICO PENAL PROHIBITIONS AND TO DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW

In Garner, the Seventh Circuit relied upon the liberal construction clause of the RICO legislation. 837 F.2d at 1418.

In the present case, the Eleventh Circuit followed its lead. A-17-18. Thus, we must confront this suggested aid to statutory construction.

A. The Way it Should Be

The Organized Crime Control Act of 1970 provides that "[t]he provisions of . . . [RICO] shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947. It is our position that the congressional Statement of Findings and Purpose preceding the Act clarifies this liberal construction clause by distinguishing between remedial purposes and criminal prohibitions. It states in pertinent part as follows:

> it is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions and by proving enhanced sanctions and new remedies to deal with the unlaw-

> ful activities of those engaged in organized crime.

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (emphasis added).

The liberal construction clause properly enjoys limited application and does not apply at all to the interpretation of the underlying predicate crimes or acts of "racketeering activity" which can trigger RICO liability. Professor Blakey and a colleague explain:

> Congress believed that the normal practice of following a policy of strict construction or the implementation of a policy of leniency was inappropriate in the context of RICO, since RICO did not draw a line between criminal and innocent conduct. Instead, RICO authorized the imposition of different criminal or civil remedies on conduct already criminal, when performed in a specified fashion. Once the policies of strict construction or leniency had been implemented in the construction of the underlying "racketeering activity," and the line had been crossed into the sphere of criminality, it was inappropriate to further restrict the scope of the statute by reapplying these policies.

G. Robert Blakey & Brian Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts--Criminal and Civil Remedies, 53 Temple L. Q. 1009, 1031-32 (1980) (emphasis added) (footnotes omitted).

If the liberal construction clause did apply to the definition of predicate crimes and widened their meanings beyond the generally accepted, contemporary understanding of the terms, then we would have an instance of "liberal re-writing of the RICO statute" rather than mere "liberal construction" of it. See United States v. Bonanno Org. Crime Fam. of La Cosa Nostra, 879 F.2d 20, 27 (2d Cir. 1989). And, serious due process questions would arise. See United States v. Anderson, 626 F.2d 1358, 1369-70 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981); see generally Dunn v. United States, 442 U.S. 100, 112 (1979). But the liberal construction

clause cannot be relied upon to create an unnaturally broad definition and to change the fair import of the words used by Congress.

Properly understood, the liberal construction clause of RICO leaves the traditional rule of lenity intact for purposes of construing the breadth of RICO predicate crimes. The court below thus erred in believing that a reference to the clause helped to justify its extraordinary rewriting of the generally accepted and ordinary meaning of the term "bribery." The rule of lenity dictates that the benefit of any doubts about the meaning of "bribery" should be resolved in favor of the accused.

This rule of lenity remains an important safeguard which is often relied upon by this Court. E.g., McNally v. United States, 483 U.S. 350 (1988); Dunn v. United States, 442 U.S. 100 (1979). So, this

important rule of statutory construction, "rooted in fundamental principals of due process," Dunn, 442 U.S. at 112, should corral the free-ranging "bribery" concept created by Garner and Kotvas.

B. **The Way it Is**

Unfortunately, the liberal construction too has been permitted to range far beyond its proper office. Thanks to the zeal of the Department of Justice, the ingenuity of civil litigants, and, most respectfully, misunderstood signals by this Court, the clause has been used to run roughshod over the rule of lenity.

The Department of Justice has pushed the liberal construction clause in support of expansive readings of RICO. It takes the position that this Court has opened the door to such "favorable interpretations" of RICO provisions:

> Although this provision may seem out of place in a criminal statute, it has been invoked by the courts in

> interpreting portions of the RICO statute. The Supreme Court, while not relying on this provision, acknowledged it in United States v. Turkette, 452 U.S. 576, 587 (1981), in the course of construing the term "enterprise." The Court also discussed the rule of lenity but mentioned no conflict between these two differing guides for interpretation. The liberal construction clause can therefore be used in arguing for favorable interpretation of RICO provisions, and the listed cases can be cited as authority for rebutting any argument that a liberal construction rule is out of place in a criminal context.

U.S. Dept. of Justice, Criminal Division, Racketeering Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors, 125-26 (1st rev. ed. Aug. 1986)(footnotes omitted), reprinted in U.S. Attorneys' Manual 9-110A.100. But the question remains, how far has the door been opened?

In United States v. Turkette, 452 U.S. 576 (1981), the issue was whether the term "enterprise" as used in RICO encompassed both legitimate and illegitimate

enterprises or only the former. Thus, the Court was construing an important term appearing in the criminal prohibitions of section 1962. The Court referred to the liberal construction clause and quoted it, but without actually expressing approval. Id. at 587. Significantly, the Court followed the quotation of the clause with the disclaimer "[w]ith or without this admonition, we could not agree with the Court of Appeals that illegitimate enterprises should be excluded from coverage." Id. (emphasis added).

Next, in Russello v. United States, 464 U.S. 16 (1983), this Court construed subsection 1963(a)(1) of RICO, a forfeiture provision. The Court held that profits and proceeds derived from racketeering activity are within the meaning of the words "any interest [the defendant] has acquired ... in violation of section 1962" and, therefore, are subject to forfeiture.

In the course of explaining this holding the Court touched upon the legislative history of RICO. Id. at 26-29. It started by quoting Congress' Statement of Findings and Purpose and the liberal construction clause. Id. at 26-27. But it did not address the clause and its significance at any length.

The case which opened the door wide for the court below and many other courts came two years later. In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, (1985), this Court construed section 1964(c) of RICO which authorizes a private suit by "[a]ny person injured in his business or property by reason of a violation of § 1962 ...." The Court held that there was no requirement of a distinct "racketeering injury"

separate from the harm resulting from the predicate acts. Id. at 493-500.[9]

In support of this reading of the private civil damage provision of the legislation, the opinion declared that "RICO is to be read broadly." Id. at 497. This majority opinion pointed to "Congress' self-consciously expansive language and overall approach" and the liberal construction clause. Id. at 498. And, the opinion stated that "[t]he statute's 'remedial purposes' are nowhere more evident than in the provision of an action for those injured by racketeering activity." Id. See also Tafflin v. Levitt, 493 U.S. 455, 467 (1990).

Then, in the next paragraph of the majority opinion in Sedima, the Court de-

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[9]The Court also rejected any requirement that a RICO civil action can proceed only after a criminal conviction for violating RICO's criminal prohibitions or criminal convictions for committing the predicate acts of racketeering activity. Id. at 488-93.

scribed RICO as an aggressive initiative to supplement old remedies with novel ones and to develop new methods for fighting crime on all fronts. 473 U.S. at 498. The Court added that "it is in this spirit that all of the Act's provisions should be read." Id. (emphasis added).

In dissent, Mr. Justice Powell addressed these general principles of construction. He observed that "[b]y constructing such a broad premise for its rejection of the 'racketeering injury' requirement, the Court seems to mandate that all future courts read the entire statute broadly." Id. 473 U.S. at 529.[10] As will be demonstrated below, many courts have

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[10]Justice Powell went on to argue that the rulings in Turkette and Russello that RICO must be read broadly and construed liberally to effectuate its remedial purposes referred only to RICO's criminal provisions. Id. He did not have occasion to distinguish between the criminal remedial provisions (like the forfeiture requirements of section 1963(a)) and the criminal penal provisions (like the prohibitions of section 1962 and the lists of predicate crimes in section 1961(1)).

indeed taken Sedima at its word and construed RICO broadly in contexts beyond the private remedy issue of Sedima.

Despite the language in the text of the majority opinion in Sedima, the case should not be taken as a "mandate" for a broad construction of the penal provisions of RICO. In footnote 10 the majority refers to the principle that criminal statutes must be strictly construed and "its identical twin," the rule of lenity. Id. at 491 n.10. Then the majority suggests that the rule of lenity may still have life:

> The strict- and liberal-construction principles are not mutually exclusive; § 1961 and § 1962 can be strictly construed without adopting that approach to § 1964(c). Cf. United States v. United States Gypsum Co., 438 U.S. 422, 443, n.19 (1978). Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident.

Id. Unfortunately, this comment in a footnote about how the penal provisions "can"

be construed strictly has been lost and the teaching in the text that all of the act's provisions should be read broadly has prevailed in most courts. E.g., Plains Resources, Inc. v. Gable, 782 F.2d 883, 886-87 (10th Cir. 1986) (applying Sedima and liberal construction clause in rejecting theory that the defendant's activities must be connected to criminal conduct of an organized nature); Ikuno v. Yip, 912 F.2d 306, 309 (9th Cir. 1990) (applying the principle that "RICO is to be read broadly" to the "pattern of racketeering" element); Sun Sav. and Loan Ass'n v. Dierdorff, 825 F.2d 187, 191, 193 n.4 (9th Cir. 1987)(semble); Torwest DBC, Inc. v. Dick, 810 F.2d 925, 928-29 (10th Cir. 1987) (applying to the "pattern of racketeering" element both Sedima's statement of principle that RICO is to be broadly construed as well as its instruction to read limitations into the statutory

definition); Beauford v. Helmsley, 865 F.2d 1386, 1393 (2d Cir.) (en banc) (applying Sedima and the liberal construction clause in interpreting RICO's "enterprise" and "pattern of racketeering activity" elements), vacated, 492 U.S. 914, adhered to on remand, 893 F.2d 1433 (2d Cir.), cert. denied, 493 U.S. 992 (1989); United States v. Kotvas, supra, (applying Sedima and the liberal construction clause to the definition of the term "bribery").

Both before and after Sedima, the liberal construction clause has been viewed by many courts as an emancipation proclamation freeing them from the rule of lenity. See generally United States v. Elliott, 571 F.2d 880, 902 (5th Cir. 1978) (coining the phrase "RICO to the rescue"), cert. denied, 439 U.S. 953 (1978). Thus, the majority of the courts of appeal have applied the liberal construction clause in interpreting the scope of RICO's criminal

prohibitions. **Second Circuit:** Beauford v. Helmsley, 865 F.2d 1386, 1393 (en banc) (definition of terms "enterprise" and "pattern of racketeering activity"), vacated, 492 U.S. 914, adhered to on remand, 893 F.2d 1433, cert. denied, 493 U.S. 992 (1989); United States v. Ruggiero, 726 F.2d 913, 919 (1984) (reach of provision incorporating state law violations as RICO predicate crimes); United States v. Bagaric, 706 F.2d 42, 53-55 (1983) (rejecting argument that RICO criminal prohibitions require proof of an ultimate and overriding financial motive to secure conviction). **Third:** United States v. Forsythe, 560 F.2d 1127, 1135-36 (1977) (definition of "associated with" an enterprise). **Fourth:** United States v. Long, 651 F.2d 239, 241 (1981) (definition of term "enterprise"). **Fifth:** United States v. Herring, 602 F.2d 1220, 1223 (1979) (citing liberal construction provision in

construing the extent to which 18 U.S.C. § 2314 is listed as a RICO predicate crime), cert. denied, 444 U.S. 1046 (1980); United States v. Salinas, 564 F.2d 688, 691 n.7 (1977)(definition of term "unlawful debt"). **Sixth:** United States v. Licavoli, 725 F.2d 1040, 1045 & n.7 (1984) (reach of provision incorporating state law violations as RICO predicate crimes). **Seventh:** Garner, supra. **Ninth:** See Ikuno v. Yip, 912 F.2d 306, 309 (1990) (applying the principle that "RICO is to be read broadly" to the "pattern of racketeering" element); Sun Sav. and Loan Ass'n v. Dierdorff, 825 F.2d 187, 191, 193 n.4 (1987)-(semble). **Tenth:** Plains Resources, Inc. v. Gable, 782 F.2d 883-886-87 (10th Cir. 1986) (rejecting theory that the defendant's activities must be connected to criminal conduct of an organized nature); see Torwest DBC, Inc. v. Dick, 810 F.2d 925, 928-29 (10th Cir. 1987) (applying to

the "pattern of racketeering" element Sedima's statement of principle that RICO is to be broadly construed). **Eleventh:** United States v. Kotvas, supra. Several decisions have pointed out, of course, that the liberal construction clause has its limits. E.g., Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1150 (10th Cir.) ("... the general principle that RICO is to be accorded a liberal interpretation cannot justify expanding section 1962(a) beyond the limits of that subsection's own language"), cert. denied, 493 U.S. 820 (1989); Bonanno Organized Crime Family of La Cosa Nostra, supra, (a legislative mandate to apply an act liberally does not justify "liberal re-writing of the statute").

A minority of the courts of appeal have refused to apply the liberal construction clause in determining the scope of RICO's criminal prohibitions. **Eighth:**

United States v. Anderson, 626 F.2d 1358, 1369-72 (1980)(rejecting an "expansive definition" of the "enterprise" element), cert. denied, 450 U.S. 912 (1981); **District of Columbia:** Yellow Bus Lines v. Local Union 639, 913 F.2d 948, 955-56 (1990)(en banc) (dictum) (noting that rule of lenity must control over RICO liberal construction clause), cert. denied, --- U.S. ---, 111 S.Ct. 2839, 115 L.Ed. 2d 1007 (1991); see also Danielsen v. Burnside-Ott Aviation Training Center, 941 F.2d 1220, 1231-32 (1991). And, as usual, there are a few decisions that could be argued either way. See, e.g., Faircloth v. Finesod, 938 F.2d 513, 518 (4th Cir. 1991) (holding that a civil RICO action is primarily remedial in nature and thus survives the defendant's death but noting that "RICO contains criminal penalties, which cannot possibly be considered 're-

medial' notwithstanding this congressional label").

We understand that the minority has not spoken very strenuously. Nonetheless, some conflict among the circuits is apparent. Perhaps the minority would have been more vocal if this Court's direction had been more exact.

Most commentators have concluded that the liberal construction clause does not apply in determining the scope of RICO's prohibitions or that it cannot be applied without violating the due process principles that underlie the rule of lenity. E.g., Barry Tarlow, RICO: The New Darling of the Prosecutor's Nursery, 49 Fordham L. Rev. 165, 177-80, 195-98 (1980); Barry Tarlow, RICO Revisited, 17 Ga. L. Rev. 291, 294-95, 308-310 (1983); Jeff Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes,

69 J. Crim. L. & Criminology 1, 14 (1978). At least one commentator, however, has taken a very liberal view of the liberal construction clause. Gary Palm, Note, RICO and the Liberal Construction Clause, 66 Cornell L. Rev. 167 (1980). As for Professor Blakey, although we quoted him at the outset of this point, we are not quite sure where he stands. Compare Blakey & Gettings, op. cit., and G. Robert Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 Notre Dame L. Rev. 237, 244-47 & n.25 (1982) with id. at 288-90 & n.150 (a footnote concluding that "[s]trict construction ... should not play any part in the interpretation of RICO.").

In short, the circuits are in conflict, leaning one way. The commentators are in conflict, leaning the opposite direction. And, this Court certainly has not clarified the issue yet.

C. The Way to Go

The confusion and uncertainty engendered by the liberal construction clause is so great that it has spurred the American Bar Association to recommend repeal. See Report to the House of Delegates, 1982 ABA Sec. Crim. Just. Rep. 20. See also Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 395-401 (1985). This Court cannot repeal a statute passed by Congress. But it can interpret a statute so as to end confusion and uncertainty about its application. It should grant certiorari and do so in the present case.

Putting aside the problem of conflict, the applicability of the RICO liberal construction clause to interpretation of its penal prohibitions presents an important question of federal law that has not actually been decided by this Court but should be. In fact, the issue adheres

in every RICO case, criminal or civil--a fast-growing population--because the criminal penalties and the civil remedies both attach to the conduct made "unlawful" by section 1962. The issue does not come to a head in every case, naturally. It does come to a head, however, whenever there is a close issue of statutory construction involving that section or definitions taken by it from section 1961. Thus, the liberal construction issue comes to the fore often. And, the occasion is usually an important one in which the court needs help in deciding how far RICO reaches. We suggest now as the occasion for this Court to help by putting the liberal construction clause back into its proper place.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1992

APPENDIX

APPENDIX

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[OPINION OF THE UNITED STATES COURT
OF APPEALS
FOR THE ELEVENTH CIRCUIT]

Entered on September 12, 1991 in
Case No. 86-3672

Before FAY and DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

DUBINA, Circuit Judge:

Appellants, Claude Tanner, Cullen H. Williams, and Joseph Kotvas appeal their convictions for various violations of the federal statutes relating to the bribery of public officials. The appellants raise thirteen issues on appeal: (1) whether the RICO offense instruction given by the district court adequately advised the jury

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*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

as to the elements of the offense; (2) whether the evidence against appellant Williams was sufficient; (3) whether violations of the Florida Unauthorized Compensation Statute are appropriate predicate acts under RICO; (4) whether the district court erred in rejecting appellant Tanner's proposed statute of limitations jury instructions; (5) whether the mail fraud charges premised upon the deprivation of the citizenry's intangible right to good government are valid; (6) whetherr the district court erred in denying a defense motion for change of venue based upon pretrial publicity; (7) whether the district court erred in refusing to grant the extraordinary remedy of an in-camera review of government files to search for the suppression of exculpatory evidence; (8) whether the district court erred in refusing to allow defense counsel to conduct post-verdict jury interviews; (9)

whether the district court erred in admitting evidence of prior consistent statements of the chief government witness through another witness; (10) whether the jury was coerced by the district court's handling of the jury or the district court's giving of a modified *Allen* charge; (11) whether the district court properly admitted tape re-corded conversations into evidence; (12) whether the district court erred in refusing to give a proposed defense jury instruction concerning an element for conviction of extortion by unlawfully obtaining property under color of official right under the Hobbs Act; and (13) whether a defendant may be prosecuted for RICO violations even if one of the predicate acts was previously the subject of a Hobbs Act prosecution. After reviewing the record, we find no merit to any of the appellants' arguments concerning issues two, four, six, seven, eight, nine,

ten, eleven, twelve, and thirteen and affirm the appellants' convictions as to those issues without opinion. However, we feel compelled to address the issues concerning the RICO offense instruction, the Florida Unauthorized Compensation statute, and the mail fraud counts. For the reasons which follow, we affirm the appellants' convictions on all counts except the mail fraud counts.

I. BACKGROUND

Appellants were members of the Hillsborough County Commission in Tampa, Florida. The Board of County Commissioners ("BOCC") is the chief legislative and policy-making body for Hillsborough County, Florida. The BOCC serves as the final authority on zoning matters in the county and makes the final decision on rate increase requests and franchise agreements for certain waste disposal companies and for major county projects. As early as

1982, the Federal Bureau of Investigation ("FBI") learned from a former county commissioner that some of the BOCC commissioners had attempted to extort money with respect to pending rezoning petitions. The FBI then began an extensive investigation into the inner workings of the BOCC.

After a three year investigation conducted by the FBI, a grand jury in the Middle District of Florida indicted Claude Tanner, Cullen H. Williams, Joseph Kotvas, and twenty-seven other defendants for conspiracy to conduct and participate in the affairs of the BOCC through a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d). The indictment also charged several defendants with the substantive offense of conducting and participating in the conduct of the affairs of the BOCC through a pat-

tern of racketeering activity in violation of 18 U.S.C. § 1962(c).

At trial, the government called 102 witnesses and introduced over 1,300 exhibits. Two former county commissioners testified as to their own involvement in bribes affecting the operation of the BOCC. The defense was allowed to cross-examination the government's chief witness for fourteen days. After a six-month trial, the jury returned guilty verdicts on various counts listed in the indictment against the appellants and acquitted thirteen of their co-defendants of all counts.

II. DISCUSSION

A. *RICO offense instruction*

The substantive elements of a violation of 18 U.S.C. § 1962(c) are as follows: "(1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendant was employed by or associated with

the enterprise; (4) that he participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that he participated through a pattern of racketeering activity, i.e., through the commission of at least two racketeering acts." *United States v. Kopituk*, 690 F.2d 1289, 1323 (11th Cir. 1982), *cert. denied*, 461 U.S. 928, 103 S.Ct. 2089, 77 L.Ed.2d 300 (1983). The question of whether the trial court instructed the jury as to all of the elements of the offense is an issue of law over which this court has plenary power of review. *United States v. Malekzadeh*, 855 F.2d 1492, 1496 (11th Cir. 1988), *cert. denied*, 489 U.S. 1029, 109 S.Ct. 1163, 103 L.Ed.2d 221 (1989). "The trial court has broad discretion in formulating a jury charge, 'so long as the charge accurately reflects the law and the facts.'" *United States v. Padilla-Martinez*, 762 F.2d 942, 952 (11th

Cir.), *cert. denied*, 474 U.S. 952, 106 S.Ct. 320, 88 L.Ed.2d 302 (1985) (quoting *United States v. Borders*, 693 F.2d 1318, 1328-29 (11th Cir. 1982), *cert. denied*, 461 U.S. 905, 103 S.Ct. 1875, 76 L.Ed.2d 807 (1983) (citations omitted)). The specific formulation of the charge and the refusal to give a requested defense instruction are both subject to review under an abuse of discretion standard. *Padilla-Martinez*, at 952.

Appellants Williams and Tanner contend that the district court's instruction to the jury was not sufficient regarding all the substantive elements of the offense under 18 U.S.C. § 1962(c). The appellants claim the district court committed reversible error by not providing to the jury the defense's requested instruction regarding a continuity element to racketeering activity. "The refusal to give a requested instruction warrants re-

versal only if (1) the [requested] instruction was substantially correct, (2) the requested instruction is not addressed in the charge actually given, and (3) the failure to give the requested instruction seriously impaired the defendant's ability to present an effective defense." *United States v. Fajardo*, 787 F.2d 1523, 1527 (11th Cir. 1986) (quoting *United States v. Lopez*, 758 F.2d 1517, 1521 (11th Cir. 1985), *cert. denied*, 474 U.S. 1054, 106 S.Ct. 789, 88 L.Ed.2d 767 (1986)). We are persuaded that the proposed instruction did not meet any of these requirements for reversal, and as such, the district court's refusal to give the proposed instruction was not an abuse of its discretion.

[1] The proposed instruction stated: "In addition, the defendant's acts of racketeering activity must be continuing, and more than sporadic, a pattern which in-

cludes different criminal episodes or transactions somewhat separated in time." R9-1266. This proposed instruction is not substantially correct according to the Supreme Court's decision in H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). According to the Supreme Court, "[c]ontinuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241, 109 S.Ct. at 2901. The proposed instruction ignored the open-ended concept and would have incorrectly advised the jury that it had to find a closed period of repeated conduct in order to find a RICO violation.

[2] Second, the charge given by the district court concerning the RICO offense was substantially correct because it in-

structed the jury on the element of continuity, which is required by the Supreme Court in *H.J., Inc.*, 492 U.S.at 241-250, 109 S.Ct. at 2901-06. The instructions given to the jury were standard Eleventh Circuit pattern jury instructions. With respect to the pattern element of an 18 U.S.C. § 1962(c) violation, the district court instructed the jury as follows: "Third, that the two predicate offenses allegedly committed by the Defendant were connected with each other by some common scheme, plan or motive so as to be a pattern of criminal activity and not merely a series of separate isolated or disconnected acts." R187-175. This instruction comports with the language of the Supreme Court in *H.J., Inc.*, and thus, sufficiently addresses the element of continuity.

The Court in *H.J., Inc.* emphasized that it is the factor of continuity plus relationship that combines to produce a

pattern. *Id.* at 239, 109 S.Ct. at 2900. The term "pattern" itself requires the showing of a relationship between the predicate acts and of the threat of continuing activity. *Id.* (citations omitted). "In normal usage, the word 'pattern' here would be taken to require more than just a multiplicity of racketeering predicates." *Id.* at 238, 109 S.Ct. at 2900. In the present case, the district court instructed the jury that continuity was required by stating that there must be a pattern of criminal activity and not just a series of separate isolated or disconnected acts. The appellants' proposed instruction did not contain any greater elaboration on the continuity requirement than the instruction given by the district court. Thus, the jury instruction, as given, was sufficient to advise the jury on the element of continuity.

Third, the jury instruction given by the district court did not prejudice the appellants in any way. The RICO violation charged in the indictment was the attempt to participate in the affairs of the BOCC through a pattern of bribery aimed at affecting the BOCC's decisions. The activities of the BOCC were necessarily continuous. By its very nature, the conduct which forms the basis of the RICo charge carries the threat of continuing activity. The jury was instructed that it must find beyond a reasonable doubt that the predicate offenses committed by the appellants were connected with each other by some common scheme, plan or motive so as to be pattern of criminal activity and not merely a series of separate or isolated or disconnected acts. R189-175. The instruction did not prejudice the appellants by impairing their ability to present an effective defense. In summary, we find

that the instruction given by the district court was not constitutionally infirm and that the district court did not err in its refusal to give the proposed defense jury instruction.

B. *Florida Unauthorized Compensation Statute*

[3] Appellants Williams and Tanner argue that violations of the Florida Unauthorized Compensation Statute, Fla.Stat. § 838.016 (1979), are not predicate acts under the RICO definition of acts involving bribery. Appellants contend that this statute does not include a requirement of corrupt intent or "quid pro quo" and thus does not fall within RICO's definition of bribery. This issue involves a question of law over which this court has plenary power of review. *See United States v. Malekzadeh*, 855 F.2d at 1496.

RICO's definition of racketeering activity includes "any act or threat in-

volving ... bribery ... which is chargeable under state law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(A). Appellants contend that Congress intended to incorporate the common law definition of bribery, which includes a corrupt intent or "quid pro quo" requirement, into the definition of racketeering activity. Thus, appellants argue that the Florida statute titled "Bribery," Fla.Stat. § 838.015, is the appropriate statute for the basis of a predicate act under RICO.

An argument similar to the appellants' was rejected by the Seventh Circuit in *United States v. Garner*, 837 F.2d 1404 (7th Cir. 1987), *cert. denied*, 486 U.S. 1035, 108 S.Ct. 2022, 100 L.Ed.2d 608 (1988). In *Garner*, the appellants had filed a motion to strike any references in the indictment to the Illinois Official Misconduct Statute, Ill.Rev.Stat. Chapter 38,

paragraph 33-3(d), which proscribed "the unlawful acceptance of a payment knowing that it was given to reward past or future favors." *Id.* at 1417. The appellants in *Garner* argued that violations of the Illinois Official Misconduct Statute could not constitute predicate acts under RICO because that statute "had no requirement of a corrupt intent or quid pro quo." *Id.* at 1417-18. The *Garner* court rejected that argument by stating that "[t]he labels placed on a state statute do not determine whether that statute proscribes bribery for purposes of the RICO statute." *Id.* at 1418. "Congress intended for 'bribery' to be defined generically when it included bribery as a predicate act." *Id.* The court found that the Illinois Official Misconduct Statute did proscribe bribery in the generic sense and, accordingly, the use of the Illinois Official Misconduct

Statute as the basis for a predicate act was correct. *Id.*

The RICO statute also defines "racketeering activity" as "any act which is indictable under ... [T]itle 18, United States Code: Section 201 (relating to bribery) ..." 18 U.S.C. § 1961(1)(B). Section 201(c)(1)(B) of Title 18 makes it a felony for a public official to unlawfully "receive ... anything of value personally for or because of any official act performed or to be performed by such official...." "Thus, the receipt of an illegal gratuity by a federal public official constitutes a RICO predicate act." *Garner*, at 1418. "We see no reason why Congress would have defined bribery more broadly for federal officials than for state officials, particularly when it is remembered that Congress intended for RICO to 'be liberally construed to effectuate its remedial purpose.'" *Id.* (quoting Pub.L.

91-452, Title IX, Section 904(a), 84 Stat. 941 (1970)).

Congress intended for RICO to be read broadly. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985). Appellants' position would narrow the definition of predicate acts under RICO and frustrate the intent of Congress. We agree with the Seventh Circuit's decision in *Garner* that the state statute addressing unauthorized compensation is a proper basis for a predicate act under RICO. The receipt of an unauthorized compensation in exchange for favorable action by a person in a position of public service constitutes an act involving bribery. The Florida Unauthorized Compensation Statute comports with the definition of racketeering activity as defined in RICO. Accordingly, the district court did not err in allowing this statute to form the basis for a predicate act.

C. *Mail Fraud*

[4] Appellants Williams and Kotvas each request that their convictions for mail fraud be reversed on the basis of this court's decision in *United States v. Italiano*, 837 F.2d 1480 (11th Cir. 1988). In *Italiano*, this court reversed the mail fraud conviction of a codefendant of Kotvas and Williams who was charged in the same indictment but whose case was severed prior to trial and who was tried separately. The court's decision in *Italiano* was based upon the Supreme Court's holding in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) that the mail fraud statute was not intended to reach schemes to defraud the citizenry of their intangible right to good government. Since the count on which Mr. Italiano was convicted is virtually identical to the mail fraud counts on which appellants were convicted, this court's decision in *Ital-*

iano that the mail fraud charge was fatally flawed because it failed to allege that either the county or state was deprived of property or money by the alleged scheme is binding.

III. CONCLUSION

Consistent with the Supreme Court's decision in *McNally*, and this court's decision in *Italiano*, we must vacate the mail fraud convictions of appellants Williams and Kotvas. In all other respects, we affirm the appellants' judgments of conviction.

AFFIRMED in part, **VACATED** in part, and **REMANDED** for resentencing.

[JUDGMENT ON PETITIONS FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT]

Entered on June 25, 1992

Case No. 86-3672

Non-Argument Calendar

Before FAY and DUBINA, Circuit Judges and ESCHBACH* Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active serve on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Fed-

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*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit sitting by designation.

eral Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

June 25, 1992.

STATUTORY PROVISIONS

At the time RICO was enacted section 1961 of Title 18, U.S.C., provided in part as follows:

§ 1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code; Section 201 (relating to bribery), section

224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of

State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor orga-

nizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * * * *

Throughout the time period of the alleged conspiracy, Section 838.015 of the Florida Statutes provided:

§ 838.015 Bribery

(1) "Bribery" means corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept for himself or another, any pecuniary or other benefit with an intent or purpose to influence the performance of any act or omission which the person believes to be, or the public servant represents as being, within the official discretion of a public servant, in violation of a public duty, or in performance of a public duty.

(2) Prosecution under this section shall not require any allegation or proof that the public servant ultimately sought to be unlawfully influenced was qualified

to act in the desired way, that he had assumed office, that the matter was properly pending before him or might by law properly be brought before him, that he possessed jurisdiction over the matter, or that his official action was necessary to achieve the person's purpose.

(3) Any person who commits bribery is guilty of a felony in the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Throughout the time period of the alleged conspiracy, Section 838.016 of the Florida Statutes provided:

§ 838.016 Unlawful compensation or reward for official behavior

(1) It is unlawful for any person corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept any pecuniary or

other benefit not authorized by law for the past, present, or future performance, nonperformance, or violation of any act or omission which the person believes to have been, or the public servant represents as having been, either within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty. Nothing herein shall be construed to preclude a public servant from accepting rewards for services performed in apprehending any criminal.

(3) Prosecution under this section shall not require that the exercise of influence or official discretion, or violation of a public duty or performance of a public duty, for which a pecuniary or other benefit was given, offered, promised, requested, or solicited was accomplished or was within the influence, official discretion, or public duty of the

public servant whose action or omission was sought to be rewarded or compensated.

(4) Whoever violates the provisions of this section shall be guilty of a felony of the third degree punishable as provided in § 775.082, § 775.083, or § 775.084.

Throughout the time period of the alleged conspiracy, Section 838.014 of the Florida Statutes provided in part:

§ 838.014 Definitions

For the purposes of this chapter, unless a different meaning plainly is required:

* * * * *

(6) "Corruptly" means done with a wrongful intent and for the purpose of obtaining or compensating or receiving compensation for any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his public duties.